



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 12 OF 2015

REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTIONS

VERSUS

JOAKIM ODWOR OKAL.....ACCUSED

JUDGMENT

1. Joakim Odwor Okal is charged with murder contrary to section 203, as read with section 204, of the Penal Code, Cap 63, Laws of Kenya. The particulars of the offence allege that on 1st January 2015 at Mukoye Village, Mahondo Sub-Location in Butere District, within Kakamega County, he murdered Pius Otieno Onyango, hereinafter referred to as the deceased. He pleaded not guilty to the charge on 17th March 2015. The hearing of the prosecution's case commenced on 18th November 2015. The prosecution called three witnesses.

2. The first on the stand was Alex Onyango, who testified as PW1. He stated that he hailed from Mukowe area of Masaba Sub-Location. On 1st January 2015, he went to bed at about 8.30 PM. Shortly thereafter his wife asked him to switch off the radio as there were noises outside their house. When he did so, he heard screams. He got out of his house and went to the fence. On the other side of the fence he saw the accused, and another person known as Onono, beating another man that he identified as Otieno, presumably the deceased herein. When he asked them why they were making noise near his compound, they left. After ten minutes, he heard their voices again. The accused was asking Onono to go and bring the man, and then the accused said he had already brought him down. The witness got out of his house again, whereupon, the accused and Onono ran away, and left Otieno lying down. The witness went to where he was, called him by his nickname, but he did not respond. When he shone his torch on him, he saw that he was lying on his back, with his head facing sideways, and blood oozing out of his mouth. The witness went back to his house and informed his wife. He then placed telephone calls to several people. While in that process, he heard movement of people on his Napier grass, he shouted at them, his uncle, Ali Onera, came out and got hold of a man known as Lule, who was holding a stone which was bloodstained. They tied him up and took him to Mahondo Administration Police (AP) Camp, where they also made a report of the incident. AP police officers visited the scene but did not remove the body. Police officers from the Manyala Police Station came in the morning and collected the body. He stated that he knew the accused person since his childhood, saying that he knew his voice very well.

3. On cross-examination, he said that on that day there was moonlight, and that he also had a torch which helped him find his way around. He stated that when he stepped out of his house for the first time, he saw the accused fighting with the deceased. When he asked them why they were fighting outside his compound, they all left, and he went back into the house. He said that he did not witness the deceased's death. He said that when they arrested Lule with the bloodstained stone, he said that it was Onono and the accused who had attacked the deceased. He stated that the police released Lule after they delayed in recording their statements. He said that he did not see the accused with any weapon. He said his fence was a live fence of vegetation, well-trimmed with holes in it through which he could see.

4. Stephen Nyerere testified as PW2. He testified that he was at home at Mukowe village on 1st January 2015. He got a call from PW1 at 9.30 PM, informing him that the accused had killed the deceased. He and his wife decided to go to the scene. He met the accused on the way, who asked him what he wanted, and when he told him what he had done, the accused ran away. They heard movement within Napier grass near the home of PW1, but when they approached the Napier grass the persons in there ran away. They managed to arrest Bernard Mumia Otieno, also known as Lule, who had a stone, and who named the persons involved with the killing of the deceased as the accused, George Oduor and Onono. During cross-examination, he said that it was PW1 who informed him that the accused was involved with the commission of the crime. He said that when he got to the scene he found four people. He said that of the four, the accused spoke to him, but the other three ran away and he did not see their faces. The accused person was not armed. He stated that Bernard Mumia Otieno was arrested by members of the public near the scene of the crime. There were people in the Napier grass, and Bernard Mumia Otieno was amongst them. He said the scene was 600 metres from the home of PW1.

5. Josia Obala Oneya testified as PW3. He was from Mukoye village, Masaba Sub-Location. He said that on 1st January 2015 at 10.00 PM, while at home, he heard people making noises outside, so he took his torch and walking stick and stepped outside. The noise was about 50 metres from his house. As he walked to the place where the noise was coming from, he met Mumia running, and he informed him that the accused, the deceased and Onono were fighting. He told him and they should go to the scene, which they did. At the scene, they found the deceased lying dead on the ground, with blood coming from his head. He said that before he got to the scene he had heard the deceased crying out asking why the accused and Onono were killing him. At the scene he found PW1 and PW2 and their wives. He said that when he

got to the scene there were persons, wearing black overcoats, who ran away from the scene. He was among the persons who made reports at the AP Camp. During cross-examination, he said that he found PW1 at the scene. He said that he did not see people fighting, but he had heard the deceased calling out the name of the accused.

6. PW3 testified on 9th February 2016, and no other prosecution witnesses testified thereafter, even though the case did come up on 10th March 2016, 14th December 2016, 19th June 2017, 20th July 2017, 11th June 2018, 18th July 2018, 21st November 2018, 5th March 2019, 21st May 2019 and 16th October 2019. The prosecution closed its case on 16th October 2019, whereupon submissions were made on a no case to answer. I ruled on 29th November 2019 that the accused had a case to answer and I put him on his defence.

7. The accused person gave his sworn defence statement on 16th December 2019. He testified that he was going home from Mahondo centre at about 8.30 PM, when, at the junction to PW1's home, he heard noises from the home of PW1. He saw Bernard Mumia Otieno and a George Obala in an active disagreement over change. The two then started to throw stones at each other, and the accused at that point decided to go on his way. Next morning he heard that the deceased had been killed by Bernard Mumia Otieno, and he saw the said Bernard Mumia Otieno in a Land Rover vehicle, belonging to the police, which was passing by. He stated that he was not with Bernard Mumia Otieno on 1st January 2015; saying that he had only seen him at a distance when he was in the disagreement with Otieno. He said that he also did not see the deceased at all on 1st January 2015. He stated that as he was going home, he met PW3 with his wife. PW3 shone a torch on his face, and he asked him why he was doing so, and the latter switched it off. He described PW3 as a brother of Bernard Mumia Otieno. He asserted that he was not involved in the death of the deceased.

8. During cross-examination, he stated that he left the Mahondo centre for home at about 8.30 PM. He described the night as having been a little dark, but with moonlight and there were torches around. He heard voices and saw people. Two of them were struggling, and he was able to identify them. As they struggled they came in his direction. Stones were thrown, and he fled to avoid being hit by the stones. He said that they came as close as 10 metres away from him. He stated that the following morning he heard that the deceased had been killed by one of the persons who were fighting the previous night. That person was Bernard Otieno. He later saw him in a police Land Rover. He had been arrested. He did not know why he was arrested, but he later heard that he was released.

9. At the close of the oral hearing the defence made oral submissions. Mrs. Muleshe submitted that the state had not proved its case to the required standard to warrant conviction of the accused person. She submitted that all three witnesses were not at the scene of the crime at the point the deceased was killed. She stated that the accused was arrested only because he was linked with the crime by Bernard Mumia Otieno. The said Bernard Mumia Otieno was arrested at some point, armed with a stone, was released and he disappeared. She stated that the witnesses mentioned other persons, yet those others were never arrested. She submitted that no eyewitness linked the accused to the offence. She stated that the evidence on record was not clear on the circumstances under which the deceased died. She also submitted that the cause of death was not established as no post-mortem report was produced. She described the omission to produce the post-mortem report as fatal. She sought acquittal of the accused person under section 316 of the Criminal Procedure Code, Cap 75, Laws of Kenya. On its part, the prosecution, through Mr. Mutua, Prosecution Counsel, stated that it relied on the court record.

10. The elements of the offence of murder, as defined in section 203 of the Penal Code, are the fact of death, the cause of the death, the role of the accused person in the cause of the death and the fact that the death is caused by the accused with malice aforethought.

11. From the material before me there is *prima facie* proof that the deceased in fact died. PW1, PW2 and PW3, who were at the scene where the deceased died, confirmed that he was dead. They made reports of the death at the local AP Camp, and escorted the police to the scene and they were present when the body was removed from the scene.

12. On the second aspect of the offence, cause of the death, medical evidence was not provided. No pathologist testified, and, therefore, there is on record no scientific evidence of what might have caused the death of the deceased. Cause of death is usually proved through a post-mortem or autopsy examination having been done, and a report of the findings placed before the trial court. No such evidence was presented. Was that fatal to the prosecution's case?

13. In the absence of medical evidence, cause of death may be proved by other means. The earliest local authority on this is the Tanzanian case of *Republic vs. Cheya and another* [1973] EA 500, where it was held that the fact of death and the cause of it could be established otherwise than by medical evidence. In that case the court relied on the evidence of eyewitnesses to determine cause of death. In the Kenyan case of *Benson Ngunyi Nundu vs. Republic* Nairobi CACRA No. 171 of 1984, the Court of Appeal noted that in some cases cause of death can be established without medical evidence, such as where the deceased was stabbed through the heart or his head crushed or where the cause of death was obvious. The court, nevertheless, pointed out that even in such cases medical evidence of the effect of such seemingly obvious and grave injuries should be adduced by experts as supporting evidence of the cause of death in the circumstances. That position was reinforced in *Kishonto ole Siololo vs. Republic* Nakuru CACRA No. 70 of 1995, where the court added that even where the cause of death was patently obvious, it was still prudent to adduce medical evidence.

14. From the judicial authorities that I have cited above, it would appear that where there is no medical evidence as to the cause of death, evidence from the other witnesses could be useful. However, it was cautioned that such evidence would only be reliable if it pointed to an obvious or patent cause of death, such a stab at the heart, or decapitation or crushing of the head. Even then, it would appear that medical evidence would still be required to explain the effect that such an injury would have had on the deceased, as a contributing factor to his death.

15. From the material before me, no evidence was given by the three witnesses who testified as to what might have caused the death of the deceased. Indeed, none of them gave clear evidence on the nature of the injuries that they observed on the deceased. PW1 merely said that blood was oozing out of his mouth. PW2 did not make any reference to the body of the deceased, beyond saying that he went to the scene of the crime. PW3 said that the deceased was bleeding from his head. From these testimonies it is not possible to state the cause of death. Indeed, no injuries were described, and it cannot, therefore, be said whether or not the same could be obvious or patent causes of the deceased's death. Quite clearly, the evidence on record cannot form a foundation for determining what caused the death of the deceased in the absence of medical evidence. That then would mean that there is no evidence at all on what caused the death of the deceased, and one

may safely conclude that the cause of death was unknown.

16. The third element of the offence, would the role of the accused in the possible causation of the deceased's death. This would be about drawing a linkage between the death of the deceased and acts or omissions of the accused. For a court to link an accused person to the death of the deceased person the subject of the trial, the cause of death must be positive. In this case, the cause of death was not established, and in the circumstances it would be academic to assess the role the accused person might have played in the causation of the death. I will, therefore, not venture to analyse the recorded evidence to assess whether the accused played any role at all in the cause of death since the cause of death itself has not been established.

17. The fourth factor relates to malice aforethought. What constitutes malice aforethought is set out in section 206 of the Penal Code, Cap 63, Laws of Kenya, which states as follows:

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

18. Malice aforethought is an intention to be inferred from either some conduct or facts. Malice aforethought is linked to the third factor, the role of the accused in the causation of the death of the deceased. In this case, the cause of death was not established, and, therefore, there cannot any basis for having to find out whether the accused person had any role in the causation of death. Flowing from that, it would be unnecessary to enquire into whether there was malice aforethought, for the same has to be linked to the cause of death and the role of the accused person in the causation of the death.

19. Overall, I do not find material upon which I can convict the accused person herein, Joakim Odwor Okal, of the charge that he faces. I accordingly find him not guilty and acquit him of the charge of the murder of Pius Otieno Onyango. He shall be set free from remand custody, if at all he is in remand in connection with this case, unless he is otherwise lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17th DAY OF January, 2020

W MUSYOKA

JUDGE